84-332

Office-Supreme Court, U.S.
FILED
AUG 30 1984
ALEXANDER L. STEVAS,
CLERK

No. _____

In the Supreme Court of the United States

October Term, 1984

AGENCY HOLDING CORPORATION,
an Illinois Corporation,
AGENCY HOLDING CORPORATION,
an Ohio Corporation,
and KERRY PATRICK CRAIG,
Petitioners,

v.

MALLEY-DUFF & ASSOCIATES, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this proceeding on May 7, 1984.

QUESTION PRESENTED FOR REVIEW

Whether a claim under Section 1 of the Sherman Act based on the termination of a distributor by a supplier for nonprice reasons, at the request of and in concert with one or more other distributors, should be judged under the rule of reason applicable according to *Sylvania* to nonprice vertical restrictions, or under the *per se* rule applicable to horizontal group boycotts.

LIST OF ALL PARTIES

The parties in the Court of Appeals for the Third Circuit were:

Malley-Duff & Associates, Inc.,
Appellant/Cross Appellee,
Plaintiff in the District Court, and
Respondent in this Petition,

Crown Life Insurance Company,
Agency Holding Corporation, an Illinois Corporation, Agency Holding Corporation, an Ohio Corporation, Clarke Burton Lloyd, and
Kerry Patrick Craig,

Appellees/Cross Appellants, and Defendant in the District Court. Crown Life Insurance Company and Clarke Burton Lloyd are not joining in this Petition. Petitioners understand that Crown and Lloyd will file a separate Petition for Certiorari.

LISTING UNDER SUPREME COURT RULE 28.1

Set forth below is a listing of the parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates of petitioners Agency Holding Corporation (Illinois) and Agency Holding Corporation (Ohio):

Agency Management, Inc.
American Assurance Marketers, Inc.
Crown Associates of Arizona, Inc.
Crown Associates of Colorado, Inc.
Crown Associates of Minneapolis, Inc.
Kerry P. Craig & Associates, Inc.

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OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Third Circuit is reported at 734 F.2d 133 (1984) and appears as Appendix A hereto. That Opinion reversed a directed verdict by the District Court against plaintiff's Sherman Act §1 *per se* group boycott claim. The Opinion of the District Court, not yet reported, appears as Appendix B hereto.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit was entered on May 7, 1984.

Petitioners' timely application for rehearing was denied on June 4, 1984, and this petition for certiorari was filed within 90 days of that date.

This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

STATUTES INVOLVED

That portion of §1 of the Sherman Antitrust Act, which this case involves provides:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.

15 U.S.C. §1.

That portion of §4 of the Clayton Act which this case involves provides:

> [A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the

United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

15 U.S.C. §15.

STATEMENT OF THE CASE

I. Basis for Federal Jurisdiction

The District Court had jurisdiction pursuant to 28 U.S.C. §1331 (general federal question jurisdiction), §1337 (commerce and antitrust regulations jurisdiction) and §1332 (diversity of citizenship jurisdiction).

II. Procedural History

From 1967 to 1978 respondent Malley-Duff & Associates, Inc. was one of the two distributors of Crown Life Insurance Company's products in Pittsburgh. Crown terminated Malley-Duff's distributorship contract in February, 1978 pursuant to a 30-day termination clause exercisable by either Crown or Malley-Duff. In April, 1978 Malley-Duff brought this action alleging, *inter alia*, a *per se* group boycott in violation of Section 1 of the Sherman Act and various common law claims.

At the close of Malley-Duff's case at trial, the District Court directed a verdict against Malley-Duff's Sherman Act § 1 claim. The case went to the jury on Malley-Duff's tortious interference and common law conspiracy claims. The jury found no tortious interference but awarded Malley-Duff $900,000 on its claim of conspiracy to tortiously interfere.

Defendants appealed and later Malley-Duff cross-appealed. The appeals were argued before the Third Circuit Court of Appeals on March 5, 1984. On May 7, 1984 the Court of Appeals reversed both the District Court's directed verdict and the jury's verdict. In the meantime, this Court had announced, on March 20, 1984, its opinion in *Monsanto Co. v. Spray-Rite Service Corp.*, ____ U.S. ____, 104 S. Ct. 1464, *reh'g denied*, ____ U.S. ____, 104

S. Ct. 2378 (1984). This petition seeks review of the Court of Appeals' reversal of the District Court's directed verdict against Malley-Duff's Sherman Act claim.

III. Statement of the Facts

Since the propriety of the District Court's directed verdict is at issue, this statement of the case will set forth a summary of the evidence considered in the light most favorable to Malley-Duff.

Crown Life has for many years marketed its insurance products in the United States through distributors known as general agents each of whom operated under one or more agency contracts. Each agency contract assigned a sales territory and provided for commissions based on sales. General agents could sell Crown products only in the territory or territories covered by their agency contract or contracts. General agents could however hold agency contracts for more than one sales territory. For example, prior to 1974, Malley-Duff held agency contracts for the Erie, Pennsylvania and the West Virginia territories in addition to Pittsburgh. Malley-Duff sold these general agencies to other general agents in the early 1970's. In many territories Crown had more than one general agent but, since at least the early 1970's, Crown had been favoring exclusive territories in order to avoid having to resolve disputes between general agents over who was responsible for a particular sale or sales.

Malley-Duff did not have an exclusive territory in Pittsburgh. One other general agent, the Ehrman agency, also had a Crown agency contract for the Pittsburgh territory.

Even though Malley-Duff and the Ehrman agency both sold Crown's products in the Pittsburgh territory,

they did not compete with each other on the basis of price or product quality. Malley-Duff conceded that state regulation of the insurance industry precluded intrabrand price or product quality competition (Transcript of Oral Argument before the Circuit Court, p.9).

Defendant Clarke Burton Lloyd was employed by Crown for 30 years until 1981. During his last five years at Crown, Lloyd was Crown's Senior Agency Vice President for the United States and in that position had, according to Malley-Duff, the power to appoint and terminate general agents and to approve loans and advances for them.

Lloyd, in 1976, conceived of the idea of forming a general agency holding corporation which would itself or through affiliates hold Crown agency contracts in 10 or 12 exclusive territories throughout the eastern United States including the Pittsburgh territory. According to Malley-Duff, Lloyd planned to control and secretly own this general agency holding corporation and use it to systematically loot Crown. In early 1977, Lloyd arranged for the incorporation of Agency Holding Corporation in Illinois and Ohio, awarded it agency contracts for the Chicago and Cleveland territories, and recruited one of his subordinates at Crown, Kerry Patrick Craig, to leave Crown and operate, according to Lloyd's directions, Agency Holding Corporation and its affiliates which were awarded Crown agency contracts by Lloyd.

According to Malley-Duff, Lloyd arranged for Craig, and Crown's Erie, Pennsylvania general agent, Robert Oglevee, to buy out the Ehrman agency in Pittsburgh and operate it as an affiliate of Agency Holding Corporation under the name of Ehrman, Ratini, Oglevee & Craig, Inc. (EROC). Lloyd then terminated Malley-Duff's agency contract by imposing a sham sales quota which Lloyd knew

Malley-Duff could not meet. This left the Ehrman/EROC agency, as the exclusive Crown distributor in the Pittsburgh territory.

In sum, according to Malley-Duff's evidence, Lloyd, using the power he had as Crown's Senior Agency Vice President, terminated Malley-Duff in order to leave the Ehrman/EROC agency, which he, through his co-conspirators Craig and Oglevee, owned and controlled, as the sole distributor of Crown products in the Pittsburgh territory. On this evidence, the district court, noting the conceded absence of price or product quality competition in the Crown intrabrand market in Pittsburgh, found no *per se* violation of Section 1. The Circuit Court disagreed and held that Malley-Duff's evidence was sufficient "to go to the jury on the *per se* group boycott claim." (Appendix A at 22a)[1]

[1]Defendants' evidence indicated that Lloyd never owned or controlled Agency Holding and that he helped Craig create it in order to increase Crown's sales and interbrand competitive position by duplicating in the eastern United States the operations of a very successful Crown general agent who held Crown agency contracts for a number of territories on the west coast.

REASONS FOR ALLOWING THE WRIT

I. Summary—The Court of Appeals Decision Is In Conflict With This Court's Decisions In *Sylvania* And *Spray-Rite* And With Decisions Of Other Courts Of Appeals. Confusion And Conflict Continue To Exist About Whether The Rule Of Reason Or The *Per Se* Rule Applies To Supplier Imposed Nonprice Distributorship Terminations. This Issue Impacts On Many Of The Product and Service Distribution Systems Throughout The Country.

Distributor and franchisee termination cases continue to be among

> the most actively litigated areas of antitrust today.*[1] Antitrust claims have become [and remain] "an almost reflexive response"*[2] of terminated distributors.[2]

Such terminations often involve not only the act of termination by a supplier located vertically above the terminated distributor in the market distribution chain but also activity by other distributors located horizontally to the terminated distributor. *Continental T.V. Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977), returned the rule of reason to prominence in judging vertical restrictions on product distribution.[3] At the same time *Sylvania* preserved the *per se* rule as the standard for "horizontal restrictions."[4] The

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[2]Piraino, *Distributor Terminations Pursuant To Conspiracies Among A Supplier And Complaining Distributors: A Suggested Antitrust Analysis*, 67 Cornell L. Rev. 297 (1982) (citing *1—Bohling, *Franchise Terminations Under The Sherman Act: Populism and Relational Power*, 53 Texas L. Rev. 1180, 1212 (1975); and *2—Halverson, *Franchisor-Franchisee Relationships—Antitrust Considerations*, 42 Antitrust L.J. 317, 318 (1974)).

[3]Vertical price fixing remained subject to *per se* treatment.

[4]*Id.* at 58 n.28.

Sylvania case made it vitally important in distributor termination cases, where other distributors have been involved in some way in the termination decision by the supplier, to determine whether the termination was a vertical restriction on distribution (rule of reason treatment) or a horizontal one (*per se* treatment).

Until this Court announced its decision this March in *Monsanto Co. v. Spray-Rite Service Corp.*, ____ U.S. ____, 104 S. Ct. 1464, *reh'g denied*, ____ U.S. ____, 104 S. Ct. 2378 (1984) (after oral argument in the instant case) the best guidance the lower courts had in making this crucial determination was contained in footnote 28 in the *Sylvania* opinion, in which the Court stated:

> There may be occasional problems in differentiating vertical restrictions from horizontal restrictions originating in agreements among retailers. There is no doubt that restrictions in the latter category would be illegal *per se*, *see, e.g., United States v. General Motors Corp.*, 384 U.S. 127 (1966); *United States v. Topco Associates, Inc.*, [405 U.S. 596 (1972)]. . . .

433 U.S. at 58 n.28.

Even though both of the cases cited in footnote 28 as examples of horizontal restrictions involved restrictions incorporated in and imposed directly as part of an agreement among horizontally located distributors, the footnote has generated continuing confusion and conflicting decisions in the Circuit Courts (and controversy in scholarly commentary) in large part because many of the Circuit Courts have interpreted vertically imposed restrictions as

horizontal restraints subject to the *per se* rule when horizontally located distributors have been involved in a supplier's decision to impose a vertical restriction.[5]

The *Spray-Rite* decision should help to end the confusion. The main focus of the *Spray-Rite* decision was to set a high standard for the sufficiency of the evidence needed to prove concerted action between a supplier and some of its distributors to fix prices accomplished by means of a vertically imposed termination by a supplier of a price-cutting distributor. This Court found that

> the need to ensure the viability of [the] *Sylvania* [holding that "nonprice vertical restrictions are to be judged under the rule of reason"] is an important consideration in our rejection of the Court of Appeals' standard of sufficiency of the evidence."[6]

Just as important to "the viability of *Sylvania*" is the *Spray-Rite* decision's treatment of a vertically imposed termination as a "vertical"[7] restriction even though other Monsanto distributors positioned horizontally to Spray-Rite, the price-cutting distributor, were involved in Monsanto's vertically imposed termination decision. This aspect of *Spray-Rite*, if properly noted by the Circuit Courts, would eliminate the confusion and conflict that has resulted from their misreading of footnote 28 in *Sylvania*. *Spray-Rite* shows clearly that vertically imposed distributor terminations are to be analyzed as vertical restrictions even though horiziontally positioned distributors instigated the supplier's termination decision.

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[5] *See* Comment, *Vertical Agreement as Horizontal Restraint: Cernuto, Inc. v. United Cabinet Corp.*, 128 U. Pa. L. Rev. 622 (1980), and the cases cited therein.

[6] ____ U.S. at ____ n.6, 104 S. Ct. at 1469 n.6.

[7] ____ U.S. at ____, 104 S. Ct. at 1466.

In the instant case the Third Circuit failed to note this clarifying aspect of *Spray-Rite*[8] and treated the nonprice, vertically imposed termination of distributor Malley-Duff as a horizontal restraint subject to *per se* treatment because the termination was instigated by Ehrman/EROC positioned horizontally to Malley-Duff.[9]

This case presents an opportunity to specifically note the light which *Spray-Rite* sheds on *Sylvania's* footnote 28, thereby "ensur[ing] the viability" of *Sylvania's* rule of reason standard, and hopefully ending the confusion and conflict which misreadings of footnote 28 have caused in the lower courts.

II. The Court Of Appeals Decision Applying The *Per Se* Rule In This Distributor Termination Case Is In Conflict With This Court's Decisions In *Sylvania* And *Spray-Rite* Which Require The Application Of The Rule Of Reason To Nonprice Vertical Restrictions Imposed By A Single Supplier On Intrabrand Product Distribution.

The Court of Appeals held: that "although the termination" of Malley-Duff by Crown which resulted from an agreement with Lloyd, Craig and Agency Holding to "freeze" Malley-Duff out of the Crown Life intrabrand insurance market was "itself, a vertical restraint",[10] the agreement's "principal impact was felt on the horizontal level";[11] the agreement should therefore be subject to the

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[8]*Spray-Rite* was decided after oral argument in the Circuit Court.

[9]The *per se* rule was adopted by the Circuit Court even though there was no possibility of price competition between the Crown distributors and therefore no possibility that the termination was part of a price fixing conspiracy.

[10]Appendix A at 15a, quoting *Cernuto, Inc. v. United Cabinet Corp.*, 595 F.2d 164, 168 (3d Cir. 1979).

[11]Appendix A at 16a.

per se rule. This decision is in conflict with this Court's decisions in *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977), and *Monsanto Co. v. Spray-Rite Service Corp.*, ___ U.S. ___, 104 S. Ct. 1464, *reh'g denied*, ___ U.S. ___, 104 S. Ct. 2378 (1984) (decided after oral argument in the instant case) which require the application of the rule of reason to nonprice vertical restrictions imposed by a supplier on intrabrand product distribution.

The Third Circuit's error is traceable to a misinterpretation of footnote 28 in *Sylvania*. In footnote 28 the Court prophetically but optimistically predicted that there

> may be *occasional* problems in differentiating vertical restrictions from horizontal restrictions originating in agreements among retailers. There is no doubt that restrictions in the latter category would be illegal *per se*, *see, e.g., United States v. General Motors Corp.*, 384 U.S. 127 (1966); *United States v. Topco Associates, Inc.*, [405 U.S. 596 (1972)]. . . .

Sylvania, supra, at 58 n.28 (emphasis added).

The problems have been far from "occasional." The Third Circuit's decision is merely one instance of many where the lower courts have mistakenly concluded that footnote 28 means that a termination imposed vertically by a single supplier in response to requests or complaints or an agreement with its distributors constitutes a horizontal restiction and is therefore illegal *per se*.

The misinterpretation is itself traceable to a misunderstanding of the phrase "originating in" in footnote 28 caused by a failure to carefully read the *General Motors* and *Topco* cases cited in the footnote as examples of "horizontal restrictions originating in agreements among retailers." Many of the lower courts have read "originating in"

to mean "resulting from" or which are "the product of" an agreement with distributors. For example, the Third Circuit's decision states that the test is whether the decision by the supplier to terminate "is not purely unilateral *but is the product of* competitors [of the terminated distributor] working in concert. . . ."[12] A careful reading of *Sylvania, General Motors* and *Topco* makes it clear that what the *Sylvania* Court meant in footnote 28 by "horizontal restrictions originating in agreements among retailers" were restrictions imposed directly in and by the agreement between the horizontally positioned competitors themselves. Nonprice restrictions on intrabrand competition imposed by a vertically positioned supplier, even if requested by or "the product of" instigations from horizontally positioned competitors remain vertical restrictions subject to the rule of reason.

In *Sylvania* this Court overruled the *per se* rule of *United States v. Arnold Schwinn & Co.*, 388 U.S. 365 (1967), and applied the rule of reason standard to nonprice, vertical restrictions imposed by a supplier on retailers. The Court recognized that vertical restrictions reduce intrabrand competition but simultaneously promote interbrand competition[13] and concluded that any anticompetitive effects on intrabrand competition which resulted from nonprice, vertical restrictions could "be adequately policed under the rule of reason, the standard traditionally applied for the majority of anticompetitive practices challenged under Section 1 of the [Sherman] Act." *Id.* at 59.

In footnote 28, the *Sylvania* Court cited *General Motors* and *Topco* as examples of "horizontal restrictions originating in agreements among retailers." In neither of

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[12]Appendix A at 18a (emphasis added).

[13]*Sylvania, supra* 51 and 54.

these cases was a restriction on distribution imposed vertically by a supplier. In each case the horizontal restriction was imposed directly by the agreement between the horizontally positioned competitors themselves. In contrast to these horizontally imposed restrictions, the vertical restriction in *Sylvania* was imposed vertically by Sylvania "at the instance" of one of Sylvania's distributors. *GTE Sylvania, Inc. v. Continental T.V., Inc.*, 537 F.2d 980, 1005 n.1 (9th Cir. 1976), *aff'd*, 433 U.S. 36 (1977).

In *General Motors* the restriction that precluded franchised dealers from dealing with discounters was imposed directly by and "in" an agreement among the franchised dealers themselves. General Motors did not itself terminate or agree not to deal with discounters or terminate or threaten to terminate franchised dealers who did. The *General Motors* Court carefully pointed this out. 384 U.S. at 143. *See also, Oreck Corp. v. Whirlpool Corp.*, 579 F.2d 126, 132-33 (2d Cir.), *cert. denied*, 439 U.S. 946 (1978) (commenting on this aspect of the *General Motors* case). What General Motors did at the request of a majority of its franchised dealers was help the dealers to "hammer out" and enforce an agreement between all of the horizontally positioned franchised dealers not to deal themselves with discounters. It was this agreement among the horizontally positioned dealers to boycott the discounters, based on the "essential" requirement of "substantial unanimity" among the dealers that directly imposed the restriction of no-dealing with discounters. The restriction "originated in" the "agreement" among the dealers.[14]

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[14]In *Klor's Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959), cited with approval in *General Motors*, the customer restriction, a refusal to deal with Klor's, was imposed directly by an agreement among horizontally positioned manufacturers and suppliers.

Topco is an even clearer case. In *Topco*, territorial and customer restrictions were contained "in" an agreement between 25 horizontally positioned independent regional supermarket chains. The agreement was embodied "in" the bylaws of the cooperative association, Topco Associates, Inc., created by the independent chains in which they were all members. The agreement between the chains directly imposed the restrictions, not any action by a vertically positioned supplier.

The Third Circuit is far from alone in misinterpreting footnote 28. Even the author of the most thorough analysis of the lower courts' responses to the footnote misreads the footnote itself. In *Intrabrand "Cartels" Under GTE Sylvania*, 30 U.C.L.A. L. Rev. 1, 4 (1982), Professor Liebeler states:

> A fourth problem [with the *Sylvania* opinion], the principal subject of this Article, was created by the Court's treatment of restrictions which suppliers adopt in response to joint activity by their resellers.*[13] This problem has been widely misunderstood. *The Sylvania opinion itself,*[*14] the subsequent lower court cases, and the commentators all conclude that intrabrand restrictions adopted by a supplier in response to joint action by its resellers are horizontal and, therefore, illegal *per se.* This view is accepted even though the restrictions affect only intrabrand competition, a form of competition that *Sylvania* indicated is not a primary concern of antitrust law.
>
> *[13] 433 U.S. at 58 n.28.
>
> *[14] *Id.*

(Emphasis added; footnotes 15 and 16 omitted).

Professor Liebeler mistakenly attributes to footnote 28 the conclusion that intrabrand restrictions adopted by a supplier in response to joint action by its resellers are horizontal. In fact, as shown above, the footnote does not stand for this conclusion.

Professor Liebeler correctly points out that lower courts have gotten themselves ensnared in a "seamless web" of the possible forms of interaction between a supplier and its distributors encountered in cases outside the situation involving purely unilateral action by a supplier. Footnote 28's use of the word "originating" has lead: to searches for the origin of the restriction—was it the result of "consultation" with or complaints or requests from the distributors; and to disputes over "numerosity"[15]—did more than one distributor "consult" with the supplier and,

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[15]Also referred to as "plurality." The Third Circuit in the instant case, looking for numerosity at the horizontal level, purports to find it in the alleged conspirators, Lloyd, Craig and Agency Holding, saying, without any basis in the record, that they are "all competitors of Malley-Duff in the insurance sales business." (App. A at 15a and 19a). The court then sets forth the evidence it says supports this statement, but all of this evidence bears only on whether Lloyd, Craig and Agency Holding were conspirators. None of it suggests that they were competitors of Malley-Duff except as they acted through the single general agency, Ehrman/EROC. The only seller of Crown Life products positioned horizontally to Malley-Duff in the Pittsburgh territory prior to Malley-Duff's termination was the Ehrman/EROC agency. According to Malley-Duff, Lloyd, Craig and Oglevee acted through the single general agency, Ehrman/EROC. If a group boycott requires joint action by more than one distributor [i.e., numerosity in horizontally positioned competitors], it was not present here. To paraphrase *Copperweld Corp. v. Independence Tube Corp.*, ___U.S. ___, 104 S. Ct. 2731 (1984), recognizing that a group of alleged conspirators who operate as one competitor, Ehrman/EROC, does not amount to a "group" boycott will "not cripple antitrust enforcement. It will simply eliminate treble damages from private state court suits masquerading as antitrust actions." *Id.* at ___, 104 S. Ct. at 2745. *See also, United States v. Citizens & Southern National*

(Footnote continued on next page)

if so, did the two or more distributors discuss the issue among themselves. *Id.* at 9-10 and cases cited therein. Liebeler concludes:

> The permutations of this formalism are nearly endless. Courts face an impossible task if they are going to try to base the application of the per se rule on considerations such as these. There is no principled way, if indeed there is any way at all, to determine the "source" or "origin" of an arrangement that comes out of a course of commercial dealing between a supplier and its resellers and that benefits both parties.

Id. at 10.

That the lower courts have misinterpreted footnote 28 in *Sylvania* is made clear by this Court's recent opinion in *Spray-Rite, supra,* decided after oral argument in the instant case.

The *Spray-Rite* Court says quite plainly that:

Bank, 422 U.S. 86 (1975) (the bank, forbidden by state law from opening branch banks, opened "de facto branches" the shares of which were held by Citizens (5%) and its officers, employees and friends. *Held:* because the sponsored banks were not set up to be competitors, § 1 did not compel them to compete, and the branch banks subsequent merger into Citizens did not reduce any pre-existing competition); *Sunkist Growers, Inc. v. Winckler and Smith Citrus Products, Inc.*, 370 U.S. 19, *reh'g denied*, 370 U.S. 965 (1962) (12,000 growers organized into three separate agricultural cooperatives with overlapping membership "are in practical effect and in the contemplation of the [antitrust] statutes one "organization" or "association"); *Century Oil Tool, Inc. v. Production Specialties, Inc.* No. 82-4514, LEXIS Gen. Fed. Lib. (5th Cir. Aug. 3, 1984) (Two corporations under common ownership and control of three men are not distinct economic units within the meaning of § 1 of the Sherman Act); *Card v. National Life Ins. Co.*, 603 F.2d 828 (10th Cir. 1979) (Life insurance company, its executive vice-president and its general agents were "really part of the [company] structure and they could not be regarded as conspirators); and P. Areeda, *Intraenterprise Conspiracy in Decline*, 97 Harv. L. Rev. 451, 461 (1983).

> [T]wo important distinctions . . . . are at the center of this *and any other distributor-termination case.* First, there is the basic distinction between concerted and independent action . . . . Section 1 of the Sherman Act requires that there be a "contract, combination . . . or conspiracy" between the manufacturer and other distributors in order to establish a violation.
>
> * * *
>
> The second important distinction in distributor-termination cases is that between concerted action to set prices *and concerted action on nonprice restrictions.* The former have been *per se* illegal since the early years of national antitrust enforcement . . . . *The latter are judged under the rule of reason* . . . . [citing *Sylvania*].
>
> * * *
>
> [I]t is of considerable importance that independent action by the manufacturer, *and concerted action on nonprice restrictions,* be distinguished from price fixing agreements, since under present law the latter are subject to *per se* treatment . . . .

Monsanto Co. v. Spray-Rite Service Corp., supra, ___ U.S. at ___, 104 S. Ct. at 1469-70 (emphasis added).

The *Spray-Rite* case and the instant case are distinguishable *only* by the fact that price restrictions were not, and, because of state regulation of insurance products, could not have been, a part of the conspiracy alleged by Malley-Duff. In both *Spray-Rite* and the instant case there was evidence of concerted action between a supplier and one or more distributors to terminate another distributor. According to *Spray-Rite* "nonprice restrictions are to be

judged under the rule of reason." *Id.* at __ n.6, 104 S. Ct. at 1469 n.6.

The Third Circuit in the instant case applied the *per se* rule in a situation in which *Sylvania* and *Spray-Rite* require the application of the rule of reason. The Circuit Court's decision should be reviewed and reversed.

III. The Court of Appeals Decision Applying The *Per Se* Rule In This Distributor Termination Case Is In Conflict With Decisions Of The Courts of Appeals For The Seventh, Second And District of Columbia Circuits Which Applied The Rule Of Reason To Non-price Distributor Terminations By A Supplier.

The Third Circuit's decision itself states that it is in conflict with the Seventh Circuit's decision in *Products Liability Insurance Agency, Inc. v. Crum & Forster Insurance Co.*, 682 F.2d 660 (7th Cir. 1982). It is also in conflict with the Second Circuit's decision in *Oreck Corp. v. Whirlpool Corp.*, 579 F.2d 126 (2d Cir.) (*en banc*), *cert. denied*, 439 U.S. 946 (1978), and the District of Columbia Circuit's decision in *Packard Motor Car Co. v. Webster Motor Car Co.*, 243 F.2d 418 (D.C. Cir.), *cert. denied*, 355 U.S. 822 (1957). All four cases involved a supplier's termination or refusal to deal with a distributor at the request or instigation of another distributor in the absence of any price control motivation.

The Third Circuit recognized that

> *Products Liability* involved a fact situation similar to the instant case. There, an insurance broker alleged that an insurance company and agency conspired to exclude it from the product liability insurance business. 682 F.2d at 662. In determining whether a § 1 violation had been made out, the Seventh Circuit,

> speaking through Judge [former professor] Posner, noted that "[t]o prove that a conspiracy or other form of agreement violates section 1 of the Sherman Act, the plaintiff must show *either* that it falls in one of the categories of 'per se' illegality *or* that it has an actual or at least probable anticompetitive effect." *Id.* at 663 (emphasis added). We have no quarrel with this. The court then noted that illegal *per se* agreements are for the most part horizontal and that vertical agreements are illegal *per se* only if their purpose is price fixing. *Id. It concluded that the alleged agreement was vertical,* and hence a *per se* violation could not be shown because there were no allegations of price fixing. *It is at this step in the Seventh Circuit's reasoning that we part company.*

Appendix A at 14a and 15a (emphasis added).

Then, citing *Cernuto, Inc. v. United Cabinet Corp.*, 595 F.2d 164, 168 (3d Cir. 1979) the Third Circuit continues:

> Malley-Duff has alleged . . . an agreement that produced an impact on the horizontal level. Plaintiff's theory seems congruent with the observation in *Cernuto.* We conclude, therefore, that in light of our own precedent, the *Products Liability* characterization of such an agreement as a vertical restraint is not binding and does not foreclose inquiry as to whether defendants' alleged agreement may have constituted a *per se* violation where its principal impact was felt on the horizontal level.

Appendix A at 15a and 16a.

The most intellectually curious thing about this admitted conflict is the fact that both Judge Posner for the Seventh Circuit and Judge Aldisert for the Third Circuit cite

Cernuto in support of their conflicting conclusions. Judge Posner cites *Cernuto* in support of the proposition that

> in the absence of any evidence of intent to raise prices—and there is no such evidence in this case—an agreement whereby a supplier . . . refuses, at the behest of one of his distributors, to deal with a competitor of that distributor is not illegal per se.

Products Liability Insura ıce Agency, Inc. v. Crum & Forster Insurance Co., supra, 682 F.2d at 663.

Judge Posner distinguishes *Cernuto* from the facts before him on the basis of an absence in those facts of an intent to raise prices.

In *Cernuto* the Third Circuit admitted that *Oreck* and *Packard* suggested "a result contrary to the one we reach today," 595 F.2d at 169, but distinguished these cases on the basis that in *Cernuto* but not in *Oreck* or *Packard* the "motivating factor in [the complaining distributor's] efforts and therefore in the resulting conspiracy was . . . price." 595 F.2d at 168. The *Cernuto* court concluded

> Given the alleged anti-competitive and arguably horizontal impact of United's decision, *and* given the price orientation of the alleged conspiracy, we cannot say that a *per se* violation of the Act may not be shown.

595 F.2d at 170 (emphasis added).

Thus, Judge Posner distinguishes *Cernuto* from the *Products Liability* fact situation on the same basis used by the *Cernuto* court to distinguish the facts before it from *Oreck* and *Packard*, namely, that in *Oreck* and *Packard* (as

in *Products Liability*) there was no evidence of price control motive behind the supplier's termination or refusal to deal, whereas in *Cernuto* there was such evidence.

Judge Aldisert, in the instant case, ignores this distinction and incorrectly relies on *Cernuto* to support the application of the *per se* rule to a termination that did not and could not possibly involve a price control motive. In doing so Judge Aldisert moves the Third Circuit squarely into conflict with the Seventh, Second and District of Columbia Circuits. To resolve this conflict the Third Circuit's opinion should be reviewed and reversed.

IV. Continuing Confusion And Controversy Exist In The Circuit And District Courts And In The Scholarly Commentary Over How To Differentiate Vertical Restrictions (Assessed Under The Rule Of Reason) From Horizontal Ones (Assessed Under The *Per Se* Rule) In Distributor Termination Cases.

Many of the recent cases which demonstrate the confusion which exists over how to differentiate vertical restrictions from horizontal ones are collected and criticized in C. Hills, *Antitrust Advisor* § 2.20 (2d Ed. 1971) (W. Liebeler Supp. 1983), and in Liebeler, *Intrabrand "Cartels" Under GTE Sylvania*, 30 U.C.L.A. L. Rev. 1, 9-13 nn. 30-40 (1982).

The cases, and often majority and dissenting opinions within the cases, have used various bases in their unsuccessful attempts to create a distinction between vertical restrictions and vertically imposed restrictions in which horizontally positioned competitors have been involved. Some courts have required numerosity—more than one

distributor must be involved.[16] Others have not required numerosity if the facts suggested a price related motive,[17] or found numerosity of conspirators sufficient in the absence of numerosity of competitors.[18] Others have tried to distinguish supplier imposed restrictions traceable to the supplier's motives from those traceable to the involvement of distributors. These courts have examined: "consultations"[19]and "discussions"[20] between a supplier and its existing distributors; "a rising tide"[21] of complaints from existing distributors; a request[22] from an existing distributor; persuasion from a competitor to transfer a distributorship;[23] and complaints[24] against a price cutter by another distributor; and reached conflicting results.

In *Intrabrand "Cartels", supra,* Professor Liebeler concurs wholeheartedly in former Professor Posner's observation in *Valley Liquors, supra* at n. 20, that "[t]here

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[16]*See, e.g., Oreck, supra; Packard, supra; Gough v. Rossmoor Corp.*, 585 F.2d 381 (9th Cir. 1978), *cert. denied*, 440 U.S. 936 (1979); and *H & B Equip. Co. v. International Harvester Co.*, 577 F.2d 239, 245 (5th Cir. 1978).

[17]*Cernuto, supra.*

[18]The instant case.

[19]*Borger v. Yamaha Int'l Corp.*, 625 F.2d 390, 394 (2d Cir. 1980).

[20]*Valley Liquors, Inc. v. Renfield Importers, Ltd.*, 678 F.2d 742, 743 (7th Cir. 1982).

[21]*Eiberger v. Sony Corp. of America*, 622 F.2d 1068, 1074 (2d Cir. 1980).

[22]*Ron Tonkin Gran Turismo, Inc. v. Fiat Distributors, Inc.*, 637 F.2d 1376, 1379 (9th Cir.), *cert. denied*, 454 U.S. 831 (1981).

[23]*A. H. Cox & Co. v. Star Machinery Co.*, 653 F.2d 1302 (9th Cir. 1981).

[24]*Battle v. Lubrizol Corp.*, 673 F.2d 984, 986 (8th Cir. 1982), *aff'd by an equally divided court*, 712 F.2d 1238 (*en banc*), *cert. denied*, _____ U.S. _____, 104 S. Ct. 1718 (1984). This case is particularly interesting because both the District Court and the Court of Appeals, *en banc*, equally divided, found the termination in issue not traceable to the complaints, while the panel of the Court of Appeals found it was traceable to the complaints.

is . . . a certain unreality in the careful parsing of motives that *Cernuto* seems to require" and adds:

> It is a curious tribute to the ingenuity of lawyers that they can take a relatively simple problem and make a mess like this out of it.

30 U.C.L.A. L. Rev. at 12.

Posner himself has written that it is impossible to make the distinctions *Cernuto* requires. *See* Posner *The Rule of Reason and the Economic Approach: Reflections on the Sylvania Decision*, 45 U.Chi.L.Rev. 1, 19-20 (1977). Professor Liebeler also notes that plaintiff's termination in the *Sylvania* case itself was "at the instance" of Sylvania's principal dealer in the area thus making it impossible to distinguish a number of the above cases from *Sylvania.*

The commentators have done no better than the courts in resolving the controversy. At times their comments about each other's approaches have gotten downright nasty. They have variously suggested that: *Sylvania* be interpreted to remove all purely intrabrand restrictions on competition from *per se* rule treatment (even where the restrictions are imposed directly by agreements between distributors);[25] that the courts stop trying to distinguish between vertical and horizontal restrictions on distribution and inquire whether a manufacturer's output or market share increased or decreased as a result of the restriction and therefore whether the restriction increased or reduced competition;[26] that purely vertical restrictions on intrabrand competition, in which there is no evidence of horizontal concert of action among distributors, be *legal*

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[25]*See Intrabrand "Cartels", supra* at 5.

[26]*See The Rule of Reason, supra* at 19-20.

per se;[27] that vertically imposed restrictions be treated as vertical only when the decision to impose the restraint is an independent decision by a supplier to control its distributors in its own interest; that when the impetus for a restriction comes from even one dealer, it be treated as horizontal;[28] that without horizontal concert of action, *i.e.*, concerted numerosity, restrictions should be treated as vertical;[29] that the distinction between vertical and horizontal refusals to deal "has only limited utility"; that the courts look beyond the distinction between vertical and horizontal to the "nature, history, purpose, and effect of the restraint";[30] and, that the courts focus on the supplier's motive in terminating the distributor by separately analyzing the fact questions of conspiracy and the activating cause of a termination.[31]

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[27]Posner, *The Next Step in the Antitrust Treatment of Restricted Distribution: Per Se Legality*, 48 U. Chi. L. Rev. 1 (1981).

[28]Comment, *Vertical Agreement as Horizontal Restraint: Cernuto, Inc. v. United Cabinet Corp.*, 128 U. Pa. L. Rev. 622, 629-30 (1980). The writers criticize the *Oreck*, *Gough* and *H&B Equipment* cases for requiring numerosity or price control motivation, and conclude by suggesting a "but for" type causation test for determining whether a manufacturer was pressured by even one dealer to eliminate a competing dealer. *Id.* at 649.

[29]Comment, *Vertical Agreements to Terminate Competing Distributors: Oreck Corp. v. Whirlpool Corp.*, 92 Harv. L. Rev. 1160, 1163 (1979), the writers praise the majority of the *Oreck en banc* court for rejecting the *per se* group boycott doctrine "since the case involved no horizontal concert of action, the distinctive ingredient of a group boycott," and point out that, if reducing the number of dealers is treated differently than substituting one dealer for another, manufacturers will be discouraged from appointing new dealers on an experimental basis. *Id.* at 1166.

[30]Bauer, *Per Se Illegality of Concerted Refusals to Deal: A Rule Ripe for Reexamination*, 79 Colum. L. Rev. 685, 712, 715 (1979).

[31]Piraino, *Distributor Terminations Pursuant to Conspiracies Among A Supplier and Complaining Distributors: A Suggested Antitrust*

(Footnote continued on next page)

The Court should take the opportunity provided by the instant case to clarify the rule that restrictions on intrabrand competition imposed vertically by a single supplier are always to be treated as vertical restrictions subject to the rule of reason regardless of the involvement of the supplier's distributors in the supplier's decision to impose the restrictions.

Analysis, 67 Cornell L. Rev. 297, 299, 320 (1982). Attorney Piraino coins the phrase "mixed termination" to describe a supplier's termination of a distributor at the urging of even one competing distributor. He suggests that neither numerosity at the horizontal level nor price control motive should be issues in determining *per se* treatment. He criticizes those courts who have refused to apply the *per se* rule for concentrating on the vertical form rather than on the horizontal competitive substance. *Id.* at 298. He proposes that once the terminated distributor has proven the existence of a "mixed termination" conspiracy, a rebuttable presumption, which the supplier could rebut, should arise that the conspiracy caused the termination and the *per se* rule should apply. *Id.* at 328.

Professor Liebeler cites Attorney Piraino's article as an example of academic writing on the issues raised by *Sylvania* that is "without economic content" and "essentially worthless to any attempt to implement an antitrust policy based on demonstrable economic effect." *Intrabrand "Cartels"*, *supra* at 4 n.16.

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should issue to the Court of Appeals for the Third Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX A

United States Court of Appeals

FOR THE THIRD CIRCUIT

Nos. 83-5396, 83-5397, 83-5406, and 83-5427

MALLEY-DUFF & ASSOCIATES, INC., a corporation

vs.

CROWN LIFE INSURANCE COMPANY, a Corporation; AGENCY HOLDING CORPORATION, an Illinois Corporation; AGENCY HOLDING CORPORATION, an Ohio Corporation; CLARKE BURTON LLOYD, an individual; KERRY PATRICK CRAIG, an individual; and ELLIE M. GOLDSTEIN, an individual

Kerry Patrick Craig,

Appellant in Nos. *83-5396* and *83-5406*

MALLEY-DUFF & ASSOCIATES, INC.,
a corporation

vs.

CROWN LIFE INSURANCE COMPANY, a Corporation; AGENCY HOLDING CORPORATION, an Illinois Corporation; AGENCY HOLDING CORPORATION, an Ohio Corporation; CLARKE BURTON LLOYD, an individual; KERRY PATRICK CRAIG, an individual; and ELLIE M. GOLDSTEIN, an individual

Crown Life Insurance Company and Clarke Burton Lloyd,

MALLEY-DUFF & ASSOCIATES, INC., a corporation

Appellants in No. *83-5397*

vs.

CROWN LIFE INSURANCE COMPANY, a Corporation; AGENCY HOLDING CORPORATION, an Illinois Corporation; AGENCY HOLDING CORPORATION, an Ohio Corporation; CLARKE BURTON LLOYD, an individual; KERRY PATRICK CRAIG, an individual; and ELLIE M. GOLDSTEIN, an individual

Appellant in No. *83-5427*

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE WESTERN
DISTRICT OF PENNSYLVANIA—PITTSBURGH
(D.C. CIVIL NO. 78-0373)

Argued
March 5, 1984

Before: ALDISERT and HIGGINBOTHAM,
Circuit Judges,
and LATCHUM, District Judge.*
(Filed May 7, 1984)

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*Honorable James L. Latchum, of the United States District Court for the District of Delaware, sitting by designation.

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OPINION OF THE COURT

ALDISERT, Circuit Judge.

Two major questions are presented in these cross-appeals from a judgment entered on a jury verdict in favor of Malley-Duff & Associates, Inc. In the appeal at No. 83-5427, we must decide whether the trial court erred in directing an adverse verdict on Malley-Duff's antitrust claim that alleged a collective refusal to deal (boycott) in violation of § 1 of the Sherman Antitrust Act, 15 U.S.C. § 1. In the appeals at Nos. 83-5396, 83-5397, and 83-5406, our primary task is to determine whether a new trial should be granted based on an inconsistency in the jury's verdict on state common law claims. Subsidiary issues involve several questions relating to admissibility and sufficiency of evidence and alleged errors in jury instructions.

Malley-Duff, a Pittsburgh-based general insurance agency, charged that Crown Life Insurance Company, a Canadian life insurance carrier; Clarke Lloyd, its former vice president in charge of United States general agencies; Kerry Craig, a former Crown employee; and Agency Holding Corporation, a multi-state general agency representing Crown Life in the United States, all participated in a *per se* group boycott against it in violation of § 1 of the Sherman Act. It also alleged that the defendants were liable under Pennsylvania common law because they conspired to tortiously interfere with Malley-Duff's Pittsburgh general agency contract with Crown Life and tortiously interfered with the contract. At the close of plaintiff's case, the district court directed a verdict for the defendants on the Sherman Act claim. After the close of all evidence, the jury found the defendants liable under one of the common law conspiracy charges and assessed damages of $900,000.00.

All parties have appealed. We conclude that there was sufficient evidence on the antitrust claim to preclude a directed verdict and that the verdict form answers on the remaining state law claims were inconsistent. We, therefore, reverse the judgment of the district court and remand for a new trial.

I.

At trial, Malley-Duff presented a theory that Lloyd, while in charge of United States general agencies for Crown Life, masterminded a scheme to create the Agency Holding Company in conjunction with Craig to take over a number of Crown Life territories, and that, *inter alia*, they intended to freeze Malley-Duff out of the Crown Life insurance business in Pittsburgh and replace it with an agency controlled by their interests. To evaluate the various contentions, it is necessary to set forth in some detail the evidence presented at trial. To the extent that the antitrust claim was terminated by a directed verdict, we invoke the familiar rule that we "consider the record as a whole and in the light most favorable to the non-moving party, drawing all reasonable inferences to support its contentions." *Tose v. First Pennsylvania Bank, N.A.*, 648 F.2d 879, 883 (3d Cir.) (quoting *Edward J. Sweeney & Sons, Inc. v. Texaco, Inc.*, 637 F.2d 105, 115 (3d Cir. 1980), *cert. denied*, 451 U.S. 911 (1981)), *cert. denied*, 454 U.S. 893 (1981).

Malley-Duff presented direct and circumstantial evidence substantially as follows. In terms of insurance in force, Crown Life, located in Toronto, ranks in the top two percent of all life insurance companies operating in North America. At the time of the relevant events, Crown marketed its products in the United States through independent general agents, with agency contracts providing for

commissions generally exceeding those offered by other life insurance companies.

The Malley-Duff agency was the oldest of seven Crown Life general agencies in Pennsylvania and represented Crown Life continuously and exclusively until its termination for a period of 23 years. The agency contract contained a 30-day termination clause. Malley-Duff did not have an exclusive franchise for Pittsburgh, Pennsylvania, but competed with the Jules Ehrman Agency, a brokerage and personal producing general agency, for the sale of Crown Life products in the area. Malley-Duff sold insurance through independent agents who, in turn, dealt with consumers. The Ehrman Agency engaged in both personal production and brokerage sales. Notwithstanding this competition, Malley-Duff produced over $58,400,000 in business for Crown Life in the Pittsburgh area from 1967 to 1977.

Employed by Crown Life Insurance Company for over 30 years, Lloyd rose to the position of Senior Agency Vice-President for the United States. From at least 1976 until 1981, Crown Life vested Lloyd with complete and unfettered power to appoint and terminate general agents and to approve loans and financing for them.

Kerry Craig began with Crown in 1969 when he was only 21-years-old. For three years, he operated Xerox machines, but then was transferred to Lloyd's Agency Department where he served two years as a messenger until 1974. About a year later, Lloyd promoted the former Xerox operator and messenger to be a Supervisor of Agencies where he remained for two years until he left Crown Life to serve as the head of Agency Holding Corporation, which was formed in 1977 pursuant to Lloyd's instructions. Agency Holding became Crown Life's general agent

in Chicago. Plaintiff contended that Lloyd and Craig controlled Agency Holding and used it to own and control general agencies in various parts of the United States, including Pittsburgh.

The creation of Agency Holding followed an interesting scenario. In October 1976, Crown Life's general agent in Chicago died. Lloyd, responsible for finding a replacement, revealed a plan to a friend, Dennis Cunningham, whose aid he attempted to enlist. Lloyd divulged that he was forming a "mega general agency holding corporation." App. at 1505a-06a. Beginning in Chicago, Cleveland, Pittsburgh and Toledo, this mega general agency holding corporation was designed to control Crown Life's general agencies throughout the eastern United States. Plaintiff contended that the plan called for Craig and Robert Oglevee to join Lloyd in the operation, and Lloyd extended an invitation to Cunningham who declined to join.

Lloyd engaged Bruce Pennamped, an attorney in Indianapolis, Indiana, to incorporate Agency Holding Corporation in Illinois. Plaintiff contended that Pennamped was a nominee for Lloyd and Craig and that he was to front for Agency Holding until Craig, a Canadian national, received immigration permission to be employed in the United States. An indemnity agreement dated February 28, 1977, between the attorney and Crown sets forth Pennamped's duties more fully. Lloyd hired him to "assist in the organization, management, operation and financing of certain of [Crown Life's] general agencies located, or to be located, in Chicago, Illinois; Cleveland, Ohio; and, Pittsburg [*sic*], Pennsylvania . . . ." App. at 2616a; Supp. App. at 635a-36a. Pursuant to Lloyd's instructions, Pennamped made

arrangements in January 1977 for Agency Holding to be qualified to do business in Ohio and Pennsylvania.

On February 11, 1977, Lloyd and Craig met with Chicago insurance executive Ralph Wood and offered Wood a position with Agency Holding. Lloyd explained that Agency Holding would be the new Chicago general agent and that it would control ten or twelve territories throughout the east, including Cleveland and Pittsburgh. Four or five vice-presidents were to be appointed and were to split 20 percent of the Agency Holding stock. Lloyd refused to divulge the identity of the 80 percent shareholder, and Mr. Wood declined the offer.

In March 1977, Crown Life, through Lloyd, appointed Agency Holding as its Chicago general agent. Pennamped continued to be the nominal head of Agency Holding although he seldom visited Chicago.

In early 1977, Lloyd terminated Crown Life's general agent in Cleveland, and awarded a new general agency for Cleveland to the newly formed Agency Holding Corporation of Cleveland, Ohio. Oglevee was the president of Agency Holding-Ohio, but Craig, still employed by Crown Life, was the majority stockholder, although there was evidence that he contributed no capital for his majority interest. Ed Horning was employed as manager and Lloyd promised him (but never delivered) 40 percent of the stock, while 20 percent was to be held by "silent partners." Supp. App. at 709a-10a. Plaintiff produced testimony that neither Craig nor Oglevee ever made a real business decision affecting any agency without first consulting Lloyd.

On July 12, 1977, the Immigration and Naturalization Service granted Craig permission to work in this country. Three days later, Craig resigned from Crown Life effective September 1, 1977 and became the company's general

agent in Chicago and Cleveland. He was just three years away from his position as messenger and Xerox operator at Crown Life.

Lloyd and Craig traveled to Pittsburgh in August 1977 and met with the principals of Malley-Duff. At that meeting, Lloyd professed dissatisfaction with Malley-Duff's production, which had exceeded $5,000,000 in 1976. He delivered an ultimatum: Malley-Duff would be terminated unless it met a production quota; moreover, Crown Life was either going to establish a new general agent in Pittsburgh or to expand the Ehrman Agency.

The quota Lloyd imposed upon plaintiff in August 1977 required Malley-Duff to produce $7,500,000 of business by December 31, 1977, the year then in progress. Less than four months remained in the appropriate business year when plaintiff learned that it had to produce 50 percent more of its business than it did the entire preceding year.

Evidence disclosed that Malley-Duff had never had a quota before, that Crown Life had never imposed a yearly quota upon any agency over nine months into the year to which it applied, and that Crown Life had never terminated a general agent producing more than $5,000,000 in business. Crown Life's internal documents disclose that 78 percent of Crown Life's United States general agencies did not produce $7,500,000 in 1977. Malley-Duff's 1977 production had placed it in the top third of all of Crown Life's 1977 general agents in the United States. Moreover, Malley-Duff was told that it had to produce $10 million in 1978, $15 million in 1979, and $20 million in 1980, an increase of 300 percent in four years.

Lloyd admitted that he did not expect Malley-Duff to meet the quota. App. at 1661a. In August 1977, Oglevee

told another general agent that he and Craig would take over Malley-Duff when it was terminated. He and Craig also agreed that their Pittsburgh venture would be more profitable if Malley-Duff were eliminated. Lloyd, Craig and Oglevee met with Mr. Ehrman in December 1977 to negotiate the acquisition of the Ehrman Agency.

Although Malley-Duff's 1977 production exceeded that of 1976, it fell short of the quota. On January 11, 1978, Crown Life mailed plaintiff a formal 30-day termination notice and, on February 13, 1978, Malley-Duff's business was transferred to the Ehrman Agency. Craig and Oglevee signed the formal purchase agreement for the Ehrman Agency and named the new agency Ehrman, Ratini, Oglevee & Craig (EROC), although Ehrman and Ratini were not owners. Craig and Oglevee and, according to plaintiff, also Lloyd, then had Crown Life's sole remaining franchise in Pittsburgh.

Direct evidence as to the true ownership of Agency Holding was not forthcoming at the trial, although there were permissible inferences that could have been drawn by the jury. At the time Craig was appointed general agent for Chicago, he admitted to one of Crown Life's officers that he owned only "part" of the holding company. He later admitted to another that he owned 20 percent of Agency Holding and refused to identify the majority owner. Crown Life investigated the matter but was not able to determine the real owner of Agency Holding. Lloyd refused to disclose the information to Crown Life's other senior officers, claiming the matter was confidential.

The evidence showed that Lloyd had control over the granting and withholding of loans and advances from Crown Life to general agents in the United States. As soon as Agency Holding obtained a Crown Life franchise, Lloyd

authorized large loans and advances for that agency that were unlike any Crown financing before or since. Crown Life funneled between $5,000,000 to $8,000,000 to Agency Holding. Lloyd left Crown Life in October 1981 and moved into Craig's Chicago apartment and took over Craig's office at Agency Holding. Lloyd then assumed control over and management of Agency Holding.

The present litigation followed these events. Malley-Duff charged that defendants conspired in violation of § 1 of the Sherman Act, 15 U.S.C. § 1.[1] It further charged that defendants were liable under Pennsylvania law for tortious interference with the Malley-Duff/Crown Life general agency contract and for conspiring to tortiously interfere with that contract. Directing a verdict on the antitrust claim at the close of plaintiff's case, the district court allowed the Pennsylvania common law claims to go to the jury. The jury returned a $900,000.00 verdict for Malley-Duff on the conspiracy claim but concluded there was no tortious interference. Malley-Duff appeals from the adverse ruling on the antitrust claim and defendants appeal, attacking, *inter alia*, the jury verdict.

II.

We turn first to Malley-Duff's contention that the district court erred in adversely directing a verdict on its antitrust claim. Section 1 of the Sherman Antitrust Act prohibits "[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States." 15 U.S.C. § 1. Courts have narrowed the apparent scope of § 1 and have concluded that it precludes only

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[1]Malley-Duff also alleged violations of § 2 of the Sherman Act and § 7 of the Clayton Act. Because Malley-Duff has not appealed the adverse directed verdict as to these counts, we do not address them here.

those contracts or combinations that "unreasonably" restrain competition. *Northern Pacific Railway Co. v. United States*, 356 U.S. 1, 5 (1958). Generally, a "rule of reason" analysis is employed to determine whether § 1 has been violated. Under this analysis, a plaintiff must show anticompetitive effect in the relevant product and geographic markets, *Martin B. Glauser Dodge Co. v. Chrysler Corp.*, 570 F.2d 72, 81 (3d Cir. 1977), *cert. denied*, 436 U.S. 913 (1978). The Supreme Court has stated, however, that "there are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." *Northern Pacific*, 356 U.S. at 5. Activities that have been treated as *per se* illegalities are price fixing, resale price maintenance, group boycotts, tying arrangements, and certain types of reciprocal dealing. *Cernuto, Inc. v. United Cabinet Corp.*, 595 F.2d 164, 166 (3d Cir. 1979) (citing cases).

Malley-Duff proceeded at trial under a group boycott theory. In directing the verdict, the district court held that there was no evidence from which a jury could conclude that defendants had violated Sherman § 1 under either a "rule of reason" analysis or a *per se* violation theory. App. at 30a.

A.

The district court determined that no antitrust offense could be established without proof that the alleged anticompetitive conduct adversely affected consumers. App. at 27a-30a. The court relied on *Products Liability Insurance Agency, Inc. v. Crum & Forster Insurance Co.*, 682 F.2d 660 (7th Cir. 1982), and concluded that the claim

had to fail because antitrust laws are designed to protect consumers and determined that "[t]hough Ehrman and Malley-Duff may have competed with each other, it was not competition which would affect the consumer." App. at 30a. It is settled, however, that when a party is proceeding on the basis of a *per se* violation, "it [is] not for the courts to decide whether in an individual case [public] injury had actually occurred." *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 211 (1959). The district court clearly erred in focusing on impact on consumers in determining there was no *per se* violation. We have previously emphasized that a group boycott, a *per se* violation, is made out where there is concerted action with "a purpose either to exclude a person or group from the market, or to accomplish some other anti-competitive objective, or both." *De Filippo v. Ford Motor Co.*, 516 F.2d 1313, 1318 (3d Cir.), *cert. denied*, 423 U.S. 912 (1975).

We also note that to the extent the district court further relied on *Products Liability* in making its determination that a *per se* violation was not established, its reliance was misplaced. *Products Liability* involved a fact situation similar to the instant case. There, an insurance broker alleged that an insurance company and agency conspired to exclude it from the product liability insurance business. 682 F.2d at 662. In determining whether a § 1 violation had been made out, the Seventh Circuit, speaking through Judge Posner, noted that "[t]o prove that a conspiracy or other form of agreement violates section 1 of the Sherman Act, the plaintiff must show *either* that it falls in one of the categories of 'per se' illegality or that it has an actual or at least probable anticompetitive effect." *Id.* at 663 (emphasis added). We have no quarrel with this. The court then noted that illegal *per se* agreements are for the most part horizontal and that vertical agreements are illegal *per se*

only if their purpose is price fixing. *Id.* It concluded that the alleged agreement was vertical, and hence a *per se* violation could not be shown because there were no allegations of price fixing. It is at this step in the Seventh Circuit's reasoning that we part company.

In *Cernuto*, this court, through Judge Adams, observed that

> if the action of a manufacturer or other supplier is taken at the direction of its customer, the restraint becomes primarily hoizontal in nature in that one customer is seeking to suppress its competition by utilizing the power of a common supplier. Therefore, although the termination in such a situation is, itself, a vertical restraint, the desired impact is horizontal and on the dealer, not the manufacturer, level.

595 F.2d 164, 168 (3d Cir. 1979). In the case before us, Malley-Duff has alleged an agreement among insurance sellers--Lloyd, Craig, and Agency Holding, all competitors of Malley-Duff in the insurance sales business--who conspired among themselves, and indirectly assisted by Crown Life, to freeze their competitive seller out of the Crown Life insurance market; an agreement that produced an impact on the horizontal level. Plaintiff's theory seems congruent with the observation in *Cernuto*. We conclude, therefore, that in light of our own precedent, the *Products Liability* characterization of such an agreement as a vertical restraint is not binding and does not foreclose inquiry as to whether defendants' alleged agreement may have constituted a *per se* violation where its principal impact was felt on the horizontal level. Hence, *Products Liability* does not defeat Malley-Duff's right to go to the jury on the theory of group boycott, which has long been regarded as a *per se* violation. *See United States v. General Motors Corp.*,

384 U.S. 127 (1966); *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959).

Because Crown, Agency Holding, Lloyd and Craig argue that other reasons may support the district court's conclusion that there was no *per se* violation, we now turn to ruling case law on group boycotts to evaluate the evidence in the light most favorable to Malley-Duff.

B.

The Supreme Court has recently reminded us that

> there is the basic distinction between concerted and independent action--a distinction not always clearly drawn by parties and courts. Section 1 of the Sherman Act requires that there be a "contract, combination . . . or conspiracy" between the manufacturer and other distributors in order to establish a violation. 15 U.S.C. § 1. Independent action is not proscribed. A manufacturer of course generally has a right to deal, or refuse to deal, with whomever it likes, as long as it does so independently.

Monsanto Co. v. Spray-Rite Service Corp., ____ U.S. ____ (52 U.S.L.W. 4341, 4343, March 20, 1984) (citations omitted). In seeking affirmance of the directed verdict, appellees argue that there was insufficient evidence of concerted action here, that Crown Life had a right to refuse to deal with Malley-Duff, and that it terminated the agency as a result of an independent marketing decision. They argue that Crown Life had the power to change agents in Pittsburgh without subjecting any of the appellees to antitrust law violations. We understand this argument completely. Previous decisions of this court have carefully made the distinction, emphasized by the Supreme Court in *Monsanto*, that a termination decision prompted by concerted action is different than one emanating from independent

action. *Ark Dental Supply Co. v. Cavitron Corp.*, 461 F.2d 1093, 1094 (3d Cir. 1972). We understand appellees' argument that there must be "something more" than simply a unilateral termination before it is considered illegal. More ingredients must be added to the factual mix before the termination goes beyond the pale of legality and becomes a phohibited act under antitrust law. We therefore must examine these additional ingredients.

"[W]here the refusal to deal is not unilateral but rather is prompted by an understanding with other parties, an antitrust violation may be found, either by application of a *per se* rule or through a 'rule of reason' analysis." *Harold Friedman Inc. v. Thorofare Markets, Inc.*, 587 F.2d 127, 142 (3d Cir. 1978) (footnotes omitted). Thus, it has been held where dealers induced General Motors to pressure recalcitrant automobile dealers not to deal with discounters, the Supreme Court noted that the fact that the restraints were induced by dealers seeking to choke off competitors at their level was sufficient to constitute a *per se* violation. *United States v. General Motors Corp.*, 384 U.S. 127 (1966). In comparison, this court found no such violation in another automobile dealership case that turned on different facts. In *De Filippo v. Ford Motor Co.*, 516 F.2d 1313 (3d Cir.), *cert. denied*, 423 U.S. 912 (1975), we concluded that plaintiffs "were not deprived of the opportunity to become a Ford dealer or to purchase products on the same basis as other dealers. They were deprived simply of the benefits of a contract offered to them at special terms. Such a deprivation, even if the product of a concerted action, does not violate § 1 of the Sherman Act." 516 F.2d at 1320-21. As explained in *Larry V. Muko, Inc. v. Southwestern Pennsylvania Building and Construction Trades Council*, 670 F.2d 421, 430 (3d Cir.), *cert. denied*, ____ U.S. ____, 103 S. Ct. 229 (1982), this

court "is among those that have attempted to limit the application of the *per se* rule to the 'classic' boycott." We repeat for the purpose of emphasis that a boycott is made out where there is concerted action with "a purpose either to exclude a person or group from the market, or to accomplish some other anti-competitive objective, or both." *De Filippo v. Ford Motor Co.*, 516 F.2d 1313, 1318 (3d Cir.), *cert. denied*, 423 U.S. 912 (1975). These cases teach, therefore, that although a unilateral decision to refuse to deal is not in and of itself a violation of the antitrust laws, if the decision is not purely unilateral but is the product of competitors working in concert with themselves or in conjunction with the company to exclude a person or a group from the market, the necessary elements of a boycott in the classical sense may be present, and hence a § 1 violation may be made out. As we see it, this was the plaintiff's theory advanced at trial.

C.

We now must decide if adequate factual elements were presented to the jury to support plaintiff's theory of a classic group boycott. We embark on this analysis mindful of the Supreme Court's latest admonition that

> [t]here must be evidence that tends to exclude the possibility that the manufacturer and nonterminated distributors were acting independently. As Judge Aldisert has written, the antitrust plaintiff should present direct or circumstantial evidence that reasonably tends to prove that the manufacturer and others "had a conscious commitment to a common scheme designed to achieve an unlawful objective." *Edward J. Sweeney & Sons*, [637 F.2d 105] at 111 [(3d Cir. 1980), *cert. denied*, 451 U.S. 911 (1981)]; accord *H.L. Moore Drug Exchange v. Eli Lilly & Co.*, 662 F.2d 935, 941 (CA2 1981) *cert. denied*, 459 U.S. 880 (1982); cf.

> *American Tobacco Co. v. United States*, 328 U.S. 781, 810 (1946) (Circumstances must reveal "a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement").

Monsanto Company v. Spray-Rite Service Corp., ____ U.S. ____ (52 U.S.L.W. 4341, 4344, March 20, 1984) (footnote omitted).

Applying this standard to the facts of this case, we believe there was sufficient evidence for the jury to believe that Agency Holding, Craig, and Lloyd were competitors who were parties to concerted action among themselves and with Crown Life to terminate Malley-Duff. There was substantial direct evidence as well as circumstantial evidence to sustain plaintiff's theory.

We deem the following circumstances to be important. At relevant times, Lloyd represented not only himself, but Crown Life as well. Lloyd was the senior agency vice-president for the United States with complete power to appoint and terminate general agents and to approve loans and financing for them. Many Crown Life decisions that directly related to Malley-Duff were made by Lloyd on behalf of his employer. This principal-agent relationship cannot be seriously controverted. Thus, under certain circumstances he acted for Crown Life; under others, he acted for himself. By February 28, 1977, Lloyd hired attorney Pennamped to organize Agency Holding Company, a mega general agency, and that Pennamped was to assist in organizing, managing, operating and financing general agencies to be located at various places in the United States, including Pittsburgh. There was sufficient evidence to support the inference that Lloyd had a financial interest in Agency Holding. There was circumstantial evidence suggesting that Craig, woefully inexperienced in the general

agency field, was but a figurehead for Lloyd. Plaintiffs contended that Craig was not licensed to sell insurance in any state. Brief for appellant at 12 n.5. There was sufficient evidence for a jury to conclude that the imposition of quotas on Malley-Duff by Lloyd and Crown Life was a contrived device to terminate Malley-Duff: requiring the agency to increase a year's production by 50 percent within the short space of four months; imposing quotas of $10 million in 1978, $15 million in 1979, and $20 million in 1980 at a time when 78 percent of Crown Life's United States general agencies did not produce $7,500,000 in annual business and also at a time when Malley-Duff's 1977 production had placed it in the top third of these general agencies. There was testimony that before the year ended Oglevee said that he and Craig would take over Malley-Duff when it was terminated and that the Agency Holding venture would be more profitable if Malley-Duff were eliminated. Lloyd, Craig and Oglevee all participated in negotiations to acquire the Ehrman Agency and when this came to fruition, Oglevee and Craig were named principals in the new agency. Finally, in his capacity as a senior vice-president at Crown Life, Lloyd caused from $5,000,000 to $8,000,000 to be funneled as loans from Crown Life to Agency Holding, the organization which he headed publicly after being discharged by Crown Life.

This direct and circumstantial evidence was more than sufficient to show "a conscious commitment to a common scheme designed to achieve an unlawful objective." The direct and circumstantial evidence support what this court has described as a classic group boycott: concerted action by competitors to exclude Malley-Duff from the market. This was not a simple unilateral action by a company to terminate a dealer as set forth in *Ark Dental Supply Co. v. Cavitron Corp.*, 461 F.2d 1093, 1094 (3d Cir.

1972). Unlike *Edward J. Sweeney & Sons, Inc. v. Texaco, Inc.*, 637 F.2d 105 (3d Cir. 1980), *cert. denied*, 451 U.S. 911 (1981), where there was no evidence that Texaco decided to terminate Sweeney because of complaints of competitors and no evidence of concerted action, here there was more than adequate evidence of an unlawful conspiracy to freeze out Malley-Duff in favor of Agency Holding. There was sufficient evidence for a jury to conclude that Lloyd and Craig conspired (1) between themselves, (2) with Agency Holding, and (3) given Lloyd's role in Crown Life, with both Agency Holding and Crown Life to the extent that Crown Life imposed artificial quotas on Malley-Duff and funneled millions of dollars into Agency Holding by way of loans. For example, had Crown Life imposed artificial quotas on Malley-Duff *without more*, this would have been a mere unilateral act. But those quotas were imposed by Crown Life through their senior vice-president Lloyd, and there was direct and circumstantial evidence that they were imposed for Lloyd's ulterior cross-purpose to implement Lloyd's scheme with Craig and Agency Holding to freeze-out Malley-Duff from Crown Life. Moreover, Crown Life's funneling millions of dollars to Agency Holding cannot be evaluated *in vacuo*; it must be considered in conjunction with the same scheme. The result was a pincers movement: to mortally wound Malley-Duff and at the same time to replenish the coffers of Agency Holding, the mega-insurance agency that directly or indirectly was to replace Malley-Duff. The district court clearly erred in determining that there was insufficient evidence to go to the jury on the *per se* group boycott claim.[2]

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[2]In the view we take it is unnecessary to consider the alternative rule of reason theory advanced by plaintiff at trial. Moreover, from our treatment of the antitrust issue here, a conclusion must necessarily

(Footnote continued on next page)

D.

Appellees Crown Life and Lloyd argue that, in any event, they are immune from liability under § 1 of the Sherman Act because of the "insurance" exemption effected by the McCarran-Ferguson Act, 15 U.S.C. § 1011-1015. There is no merit to this contention. First, McCarran-Ferguson only exempts "the business of insurance," i.e., primarily the insurer-insured relationship, from the antitrust laws and not all the actions of insurers generally. *Group Life & Health Insurance Co. v. Royal Drug Co.*, 440 U.S. 205 (1979). Second, the Act itself specifically excludes from the exemption "any agreement to boycott, coerce, or intimidate . . . ." 15 U.S.C. § 1013(b). Thus to the extent that Malley-Duff argues that appellees' conduct constituted a group boycott, appellees may not use McCarran-Ferguson as a shield.

III.

We now turn to the contentions presented by Crown Life, Agency Holding, Lloyd, and Craig (hereinafter appellee-cross appellants) in their cross-appeals that a new trial should be granted because of inconsistent answers in the verdict form covering the claims brought under Pennsylvania common law.[3] The reply of Malley-Duff is twofold. It

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follow that there was sufficient evidence to go to the jury on the common law conspiracy issue, thus rejecting contentions presented by Crown Life and Lloyd.

[3]The verdict form, with the jury's responses noted by an "X", provides in relevant part:

> 1. As to plaintiff's claim that all of the defendants other than Crown Life Insurance Company tortiously interfered with its contractual relationship with Crown Life Insurance Company, we, the jury, hereby find (make a separate finding as to each defendant listed):

(Footnote continued on next page)

argues that appellee-cross appellants have waived any inconsistent verdict objection. Alternatively, Malley-Duff argues that there is no inconsistency in the answers.

We do not accept Malley-Duff's contention that appellee-cross appellants have waived the right to raise the

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Agency Holding Corp. (of Illinois)—___ liable; _X_ not liable.
Agency Holding Corp. (of Ohio)— ___ liable; _X_ not liable.
Clarke Burton Lloyd— ___ liable; _X_ not liable.
Kerry Patrick Craig— ___ liable; _X_ not liable.

2. (A) As to plaintiff's claim that all of the defendants conspired to tortiously interfere with its contractual relationship with Crown Life Insurance Company, we, the jury, hereby find (make a separate finding as to each defendant listed):

Crown Life Insurance Co.— _X_ liable; ___ not liable.
Agency Holding Corp. (of Illinois)— ___ liable; _X_ not liable.
Agency Holding Corp. (of Ohio)— ___ liable; _X_ not liable.
Clarke Burton Lloyd— _X_ liable; ___not liable.
Kerry Patrick Craig— _X_ liable; ___not liable.

(B) As to plaintiff's claim that all of the defendants conspired with the specific intent to inflict injury upon the plaintiff, we, the jury, hereby find (make a separate finding as to each defendant listed):

Crown Life Insurance Co.— ___ liable; _X_ not liable.
Agency Holding Corp. (of Illinois)— ___ liable; _X_ not liable.
Agency Holding Corp. (of Ohio)— ___ liable; _X_ not liable.
Clarke Burton Lloyd— ___ liable; _X_ not liable.
Kerry Patrick Craig— ___ liable; _X_ not liable.

GO ON TO QUESTION NO. 3 ONLY IF YOU HAVE FOUND ONE OR MORE OF THE DEFENDANTS LIABLE. OTHERWISE, RETURN TO THE COURTROOM WITH YOUR VERDICT. (YOU MAY ENTER DAMAGES ONLY AGAINST THOSE DEFENDANTS WHOM YOU HAVE FOUND LIABLE IN PARAGRAPH 1 OR PARAGRAPH 2).

3. As to the claim(s) above for which we, the jury, have found in favor of the plaintiff, we hereby award:

(a) compensatory damages:

None _____ .
$ 900,000 .

App. at 638a-39a.

inconsistent verdict issue. Malley-Duff argues that, based on the last sentence of Rule 49(b), F.R. Civ. P., the objection must be raised before the jury is discharged:

> When the answers are inconsistent with each other and one or more is likewise inconsistent with the general verdict, judgment shall not be entered, but the court shall return the jury for further consideration of its answers and verdict or shall order a new trial.

But Rule 49(b) specifically applies to a "General Verdict Accompanied by Answers to Interrogatories." Here, there was no general verdict. The "Verdict Form" submitted to the jury, *see supra* note 3, more properly is considered a verdict returned under Rule 49(a) "Special Verdicts," rather than under Rule 49(b) "General Verdict Accompanied by Answers to Interrogatories." Rule 49(a) contains no provision similar to that contained in Rule 49(b) stating that the "court shall return the jury for further consideration of its answers and verdict . . . ." Although it obviously would be preferable for counsel to cause an objection to be recorded on the basis of inconsistent answers in the Special Verdicts, no decision of this court has precluded appellate review of inconsistencies under a Rule 49(a) verdict in the absence of an objection before the jury was discharged. To the contrary, in *Halprin v. Mora*, 231 F.2d 197 (3d Cir. 1956), this court considered the inconsistencies of answers to special verdicts even though the court noted that "nowhere in the record furnished us do we find evidence that the plaintiff considered the answers confusing, or inconsistent or irreconcilable." 231 F.2d at 201.

We conclude that the answers to Questions 1, 2(A), and 2(B) may be considered inconsistent and accordingly agree with the appellee-cross appellants. We will vacate the

$900,000 verdict in the state law claims and order a new trial. Because this issue may recur, we will explain in some detail our perception of the inconsistencies and will offer suggestions how the problem may be avoided upon retrial.

A.

We begin by examining the anatomy of the Pennsylvania civil conspiracy law. Judge Sloviter has explained that the modern Pennsylvania tort of civil conspiracy is a fusion of two lines of cases. The tort may be made out upon proof of a "combination to do an unlawful act." This stems from an earlier conspiracy tort "in which the gist of the conspiracy was the tort itself." *Franklin Music Co. v. American Broadcasting Co.*, 616 F.2d 528, 549 (3d Cir. 1979) (Sloviter, J., concurring in part). The tort may also be made out upon proof of a "'combination to do a lawful act by unlawful means', [a concept that] stems from the cases holding that conspiring was itself an independent tort." *Id.* The gravamen of this second conspiracy formulation is the combination to do acts with intent to injure another. *Id.* at 551.

It was explained at oral argument that Question 2(A) was designed to cover the first formulation--a combination to do an illegal act.[4] Thus, the jury was asked if the defendants "conspired to tortiously interfere with [plaintiff's] contractual relationship with Crown Life." It was also explained that Question 2(B) was designed to cover the second formulation--a combination to do a lawful act by unlawful means.[5] Thus, the jury was asked if the defendants "conspired with the specific intent to inflict injury upon the plaintiff."

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[4]Oral argument transcript at 36.

[5]*Id.*

By its determination that defendants did not conspire "with the specific intent to inflict injury upon the plaintiff," it follows that the jury's conclusion that defendant conspired to tortiously interfere with plaintiff's contract with Crown Life must have been based on the first conspiracy formulation--an agreement to do an unlawful act. The jury, however, also determined, in its response to Question 1, that defendants had not "tortiously interfered with [plaintiff's] contractual relationship with Crown Life . . . ." Because there was proof of only one unlawful act, interference with a contractual relationship, *see* app. at 2428a, the jury's responses appear inconsistent. The answers may not be reconciled under an abandonment theory. There was no evidence adduced at trial that defendants either abandoned plans or accomplished a result different from that planned. Therefore, the jury's answers on the verdict form are inconsistent and irreconcilable. We turn to consider what may have caused the inconsistencies.

We believe it was Questions 2(A) and 2(B), relating to conspiracy, that led to jury confusion. Although the jury was given an instruction in the abstract explaining the difference under Pennsylvania law between the two types of conspiracies, there was no explanation of how these two esoteric concepts applied to the evidence that was presented. As appellate judges, we *now* know what was intended by Questions 2(A) and 2(B), but it required questioning at oral argument to clarify the matter. But unfortunately, at trial, the closing arguments of counsel did not even address the two different types of conspiracy and the jury instructions treated this very complex subject in legal terms somewhat lacking in perspicuity.[6]

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[6]For example, the court instructed the jury:

(Footnote continued on next page)

We now know that counsel intended Question 2(B) to cover a theory that the termination of the Malley-Duff agency contract could have been a lawful act, but that the allegedly illegal combination to perform this act constituted the tort. This theory was expressed by asking the jury in 2(B) whether the "defendants conspired with the specific intent to inflict injury upon the plaintiff." But such a statement is woefully ambiguous. The jury could well have concluded that 2(B) was simply another way of expressing 2(A): that the defendants "conspired to tortiously interfere with [plaintiff's] contractual relationship with Crown Life." "Tortious interference" covers a multitude of sins, but at least it covers a situation where there is conduct "with the specific intent to inflict injury." We believe that it was not only possible, but also probable, that the jury did not understand the distinction between a conspiracy to tortiously interfere with plaintiff's contract and a conspiracy designed with a specific intent to inflict injury upon the plaintiff. Indeed, we are not confident that trained lawyers and judges who have studied the historical development of Pennsylvania civil conspiracy would have grasped the abstruse distinction without more explanation than was furnished the jury by counsel. The court charged that "[t]o prove a civil conspiracy under Pennsylvania law, the plaintiff must show . . . that two or more persons . . . combined or agreed with intent to do an unlawful

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> The other type of conspiracy is one involving the use of unlawful means, which is found whenever there is a combination of persons or entities to do acts with the intent to injure another.
>
> Thus, a conspiracy which charges use of unlawful means does not require the use of illegal or tortious methods.
>
> What it does require is that the participants act in concert with the intent to injury another.
>
> In this case, the plaintiff claims that all of the defendants conspired against it with the intent to injure plaintiff.

App. at 2537a-38a.

act or to do an otherwise lawful act by unlawful means." App. at 2537a. The court further charged:

> With respect to the plaintiff's claim that all of the defendants conspired to tortiously interfere with the plaintiff's contractual relationship with Crown, the plaintiff must prove, as to each defendant, that that defendant had the specific intent to interfere with plaintiff's contractual relationship.
>
> With respect to plaintiff's claim that all of the defendants conspired with the intent to injure it, the plaintiff must prove, as to each defendant, that that defendant had the specific intent to injure it.

Id. at 2541a. These instructions can be construed as applying the intent requirement to both conspiracy formulations. To the jury, the intent to do an unlawful act was, in all likelihood, synonymous with the intent to injure another. Devoid of a careful explanation, the two questions were too rich for the lay jury's blood. Based on plaintiff's direct and circumstantial evidence, its tort theory seemed simple and straightforward: the defendants conspired to inflict injury upon Malley-Duff by tortiously interfering with its contract with Crown Life.

Requested special interrogatories and requested jury instructions should be simple and straightforward. If the case proceeds or is defended on alternative conspiracy theories, it will fall upon counsel to explain carefully in language capable of lay comprehension what is intended by the various conspiracy theories. Once this is accomplished, there will be more effective direction in fashioning both the special verdict form and jury instructions. And this should minimize the possibility of a jury again returning inconsistent answers.

IV.

We now turn to other contentions presented by the appellant and appellee-cross appellants in their cross-appeals.

A.

First, appellee-cross appellants argue that the trial court erred by failing to instruct the jury on causation on the civil conspiracy issue. In reviewing jury instructions when error has been alleged, a new trial will be required only if the instructions, taken as a whole, give a misleading impression or inadequate understanding of the law and the issues to be resolved. *Bass v. International Brotherhood of Boilermakers*, 630 F.2d 1058, 1062 (5th Cir. 1980). Here, the court gave a causation instruction when it charged the jury on the tortious interference claim, app. at 2536a, and again when it discussed the awarding of damages in general, app. at 2543a. We conclude, therefore, that because these causation instructions were properly given, the need for a causal connection was made sufficiently plain to the jury so as not to render the overall instructions misleading or inadequate.

Next, we are satisfied with the court's exercise of discretion in refusing to admit evidence on how Herbert Sachs, now deceased, a former attorney of Craig, caused a bizarre investigation of the district judge originally assigned to this case. There is no question that Sachs's efforts were irresponsible, totally unjustified, and tantamount to sheer intimidation of a federal judge. Malley-Duff sought to introduce this evidence for punitive damages purposes and assigns the court's refusal to admit it as error. We find no abuse of discretion in refusing to admit this evidence on the ground that it would introduce a collateral matter that seems to implicate the attorney more than the litigant.

A related phase of this same problem involved evidence introduced that the Chicago office of Agency Holding purchased a paper shredder after the complaint was filed in this case. The trial judge instructed the jury that if it found that evidence had been intentionally destroyed, it could infer that the evidence would have been favorable to plaintiff. In explanation of the paper shredding, Craig unsuccessfully sought to introduce statements made by Sachs to Craig as to why he had embarked on his ill-fated mission and assigns as error the court's refusal to admit it. We hold that the court did not abuse its discretion in refusing to admit any evidence of the Sachs escapade. Had Craig been successful in having a partial account admitted, Malley-Duff would have been entitled to introduce the entire sordid tale of Sachs's machinations, a tale collateral to the main litigation.

B.

All appellee-cross appellants argue that the evidence did not support the damages awarded to Malley-Duff. Specifically, the main thrust of their argument is that the method of valuation and evidence introduced by Malley-Duff was speculative and incapable of sustaining a damage award.[7] We disagree.

Generally, when the loss of business is alleged to be caused by the wrongful acts of another, damages are measured by one of two alternative methods: (1) the going concern value; or (2) lost future profits. *Arnott v. American Oil Co.*, 609 F.2d 873, 887 (8th Cir. 1979), *cert.denied*, 446

[7]Appellee-cross appellants also argue that Malley-Duff failed to establish the fact of damage. In view of our disposition of this case, we do not reach this issue. We note, however, that to the extent Malley-Duff shows, on remand, that loss of its business was caused by the unlawful acts of defendants, the fact of damage is established.

U.S. 918 (1980); *Lehrman v. Gulf Oil Corp.*, 500 F.2d 659, 663-64 (5th Cir. 1974), *cert. denied*, 420 U.S. 929 (1975). In the instant case, plaintiff opted to establish the going concern value. That value is the price a willing buyer would pay and a willing seller would accept in a free marketplace for the business in question. *Albrecht v. Herald Co.*, 452 F.2d 124, 131 (8th Cir. 1971); Rulon, *Proof of Damages for Terminated or Precluded Plaintiffs*, 49 Antitrust L.J. 153, 154-55 (1980). Damages are measured as the difference between that price before and after the termination. *Pitchford v. PEPI, Inc.*, 531 F.2d 92, 109 (3d Cir.), *cert. denied*, 426 U.S. 935 (1976).

To establish the going concern value, plaintiff applied a multiplier to the "Linton value" of the agency. The Linton value, an industry formula for determining the present value of a life insurance agency by reference to its vested renewal income, is capitalized through the use of the multiplier. The result of the formula is considered a reasonable approximation of what a willing buyer would pay and a willing seller would accept for the business.

Appellee-cross appellants challenge the use of the Linton value formula, and contend that Malley and Duff, partners in the Malley-Duff agency, were incompetent to present the data necessary to make the calculation. We find no error. "[W]hile the damages may not be determined by mere speculation or guess, it will be enough if the evidence show[s] the extent of the damages as a matter of just and reasonable inference, although the result be only approximate." *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 563 (1931); *Ashcraft v. C. G. Hussey & Co.*, 359 Pa. 129, 132-33, 58 A.2d 170, 172 (1948). Moreover, the proof may be indirect and may

include estimates based upon assumptions. It is only necessary that the assumptions rest on adequate data. *Lehrman v. Gulf Oil Co.*, 500 F.2d 659, 668 (5th Cir. 1974), *cert. denied*, 420 U.S. 929 (1975); *see also William Goldman Theatres, Inc. v. Loew's, Inc.*, 69 F. Supp. 103 (E.D. Pa. 1946), *aff'd per curiam*, 164 F.2d 1021 (3d Cir.), *cert. denied*, 334 U.S. 811 (1948). The "law only requires that a reasonable quantity of information must be supplied by plaintiff so that the jury may fairly estimate the amount of damages from the evidence." *Ashcraft v. C. G. Hussey & Co.*, 359 Pa. 129, 132-33, 58 A.2d 170, 172 (1948); *see also Pugh v. Holmes*, 486 Pa. 272, 297, 405 A.2d 897, 909-10 (1979).

We are satisfied that such was the case here. Malley and Duff's estimates of the going concern value were based upon the agency's Linton value during the period in question, and the formula used as a multiplier was shown to be an accepted industry practice. *Cf. Standard Oil Co. of California v. Moore*, 251 F.2d 188, 221 (9th Cir. 1957), *cert. denied*, 356 U.S. 975 (1958). Moreover, we have a neat sauce-for-the-goose scenario here. Notwithstanding appellees' objections to the use of the Linton value here, there was evidence that Craig and Lloyd used the same formula to establish price when they purchased other general agencies, such as Hartford (Linton x 2.5) and Newark (Linton x 3). App. at 1497a-99a, 1668-72a. Evidence was introduced that in the insurance industry, as in a number of industries, there are accepted formulas or rules of thumb that are employed as a means of valuing a business. Under such an accepted rule of thumb, a value is assigned by multiplying the annual earnings or sales of the business unit by some factor in order to determine its going concern value. *See, e.g.*, Rulon, *Proof of Damages for Terminated or Precluded Plaintiffs*, 49 Antitrust L.J. 153, 155 n.11 (1980).

We conclude that the appellees were free to challenge the assumptions of the Linton value and multiplier and note that they did so for the jury. That they were unsuccessful as a matter of fact does not mean that the formula was incorrect as a matter of law.

C.

Finally, appellee-cross appellants complain that the court improperly excluded evidence to show that Malley-Duff's production was very low prior to its termination, and that subsequent to its termination the new general agent, EROC, achieved much higher production levels. The purpose of this evidence was to show that the termination of Malley-Duff was the result of Crown Life's independent action, rather than concerted action by the several defendants. We find no error in excluding this evidence. First, Crown Life did not know at the time it terminated Malley-Duff what its successor's performance would be. Accordingly, such evidence was irrelevant to the proposition that Crown's actions were non-conspiratorial. Moreover, this evidence could be considered misleading because EROC was the sole surviving Crown Life Agency in Pittsburgh. The proffered EROC figures incorporated the combined business of the old Ehrman office, the old Malley-Duff office and the new firm. It was a case of comparing EROC apples, as the single surviving agency, with oranges, the production of one of two previous agencies. EROC's sales were therefore not necessarily comparable to Malley-Duff sales taken alone. Additionally, there was the distinct possibility that such evidence would have opened the door to many collateral issues, *inter alia*, the means by which EROC obtained its new business, and what portion of EROC's business lapsed from the books by its first anniversary and actually constituted a loss to Crown Life.

V.

We have carefully considered all contentions presented by the appellant and cross-appellants. We will reverse the judgment of the district court and remand for a new trial consistent with the foregoing.

A True Copy:

Teste:

Clerk of the United States
Court of Appeals for the
Third Circuit

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

MALLEY-DUFF & ASSOCIATES, INC., a corporation

Plaintiff,

vs.

CROWN LIFE INSURANCE COMPANY, a corporation, et al.,

Defendants.

Civil Action No. 78-373

OPINION OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA, DIRECTING A VERDICT AGAINST PLAINTIFF'S ANTITRUST CLAIMS, DATED MARCH 30, 1983.

THE COURT: In count one, the plaintiff charged the defendants with a violation of Section 1 of the Sherman Act. In order to recover under this section, the plaintiff must prove that the defendants conspired with the purpose or effect of producing adverse, anti-competitive effects within relevant product and geographic markets. See Martin v. Glauser Dodge Company v. Chrysler Corporation, 570 F.2d 72, at page 80, a Third Circuit case decided in 1977. No evidence has been presented which would support such a conclusion.

The plaintiff has consistently argued that the alleged collusion between defendants Crown and/or Lloyd and defendants Agency Holding and Craig to replace general agents in the various cities amounted to a boycott which would constitute a per se violation. As this Court noted in

its written opinion on defendants' motion for summary judgment, the Third Circuit reviewed a similar business relationship in Cernuto, Inc. v. United Cabinet Corporation, cited at 595 F.2d 164, a 1979 Third Circuit decision. Clearly, in Cernuto, the Third Circuit required that there be a showing of anti-competitive purpose or effect prior to determining that the alleged conduct constituted a per se violation of Section 1 of the Sherman Act.

There is no evidence from which a jury could conclude that Craig, Lloyd or the Agency Holding defendants could, would or did increase the price of an insurance policy sold to consumers. Though Crown certainly had the power to increase prices, there is no evidence from which a jury could conclude that Crown conspired with the other defendants with the intention of increasing its rates.

This Court recognizes that an antitrust violation could be found in conduct which stifles intrabrand competition. However, since there was no evidence of price competition between the Ehrman agency and Malley-Duff prior to the alleged takeover of plaintiff's agency, the only form of intrabrand competition which could have existed and benefited the consumer might have been found either in the servicing of the policies or in an enhancement of benefits offered under a policy at the same price. No evidence was presented from which a jury could conclude that the quality of service or the quality of Crown life insurance policies could be or was affected by the takeover of the Malley-Duff agency.

The plaintiff has urged this Court to focus on the effect of the defendants' conduct on its competitor rather than the effect on competition. Thus, according to the plaintiff's theory, if a conspiracy were formed to eliminate existing Crown Life agencies so that the defendants could

enter the market in a particular city without facing established competition, the elimination of the agency would constitute an antitrust violation in and of itself as an attempt to stifle competition before entry into the market. In essence, the plaintiff's position is that the intent to destroy a competitor is synonymous with an anti-competitive purpose. Though Klor's, Inc. v. Broadway-Hale Stores, Incorporated, 359 U.S. 207, a 1959 case, has been cited for the proposition that driving a competitor out of business constitutes a violation of the Sherman Act in and of itself, the United States Supreme Court specifically noted that the Klor's case was not a case of a single trader refusing to deal with another, nor even of a manufacturer and dealer agreeing to an exclusive distributorship.

The Seventh Circuit has recently decided a case much more analogous to the instant one in Products Liability Insurance Agency, Inc. v. Crum & Forster Insurance Company, 682 F.2d 660, a 1982 Seventh Circuit case. The Seventh Circuit distinguished Klor's first on the ground that the relationship between an insurance carrier and one of its agents was more akin to that of a manufacturer and a dealer and, second, on the ground that even in Klor's the Court's ultimate concern was with the consumer. Though Ehrman and Malley-Duff may have competed with each other, it was not competition which would affect the consumer.

In summary, there is no evidence from which a jury could conclude that the defendants conspired with the purpose or effect of producing adverse, anti-competitive effects within relevant product and geographic markets; nor is there any evidence from which the jury could conclude that the alleged boycott constituted a per se violation of Section 1 of the Sherman Antitrust Act. As Judge Seitz

so aptly put it in Sitkin Smelting and Refining Company v. FMC Corporation, 575 F.2d 440, at pages 447 through 448, a 1978 Third Circuit opinion:

> "Plaintiffs have not maintained their burden to show that the combination in any substantial way either did or could affect interstate commerce by controlling market prices, imposing undue limitations on competitive conditions, or unreasonably restricting competitive opportunity. These are the kinds of practices the Sherman Act was enacted to prohibit. Conduct not within the scope of the Act is not made into an antitrust violation by accompanying conduct which is reprehensible under some moral or ethical standard or even illegal under some other law."

I, therefore, direct a verdict for all the defendants as to count one.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

**Nos. 83-5396, 83-5397,
83-5406, and 83-5427**

Malley-Duff & Associates, Inc., etc.

vs.

Crown Life Insurance Co., etc.

Kerry Patrick Craig, *Appellant,* Nos. 83-5396 & No. 83-5406

Crown Life Insurance Co. and Clarke Burton Lloyd, *Appellants,* No. 83-5397

Malley-Duff & Associates, Inc., etc., *Appellant,* No. 83-5427

(W. D. Pa. Civ. No. 78-0373)

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge,* ALDISERT, ADAMS, GIBBONS, HUNTER, WEIS, HIGGINBOTHAM, SLOVITER and BECKER, *Circuit Judges,** and LATCHUM, *District Judge.***

The petition for rehearing filed by Agency Holding Corporation (Illinois), Agency Holding Corporation (Ohio), and Kerry Patrick Craig in the above entitled case

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*Judge Garth did not participate in the consideration of this matter.

**Honorable James L. Latchum, of the United States District Court for the District of Delaware, sitting by designation.

having been submitted to the judges who participated in the decision of this court and to all other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT

/s/ ALDISERT, C. J.
Circuit Judge

DATED: June 4, 1984